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The United States Copyright Office: Nostalgia for the Past, Obstacle for the Future

THE UNITED STATES COPYRIGHT OFFICE: NOSTALGIA FOR THE PAST, OBSTACLE FOR THE FUTURE

by Jacob Harper*

For years, intellectual property policy in the United States has grown increasingly more important. With information technology's growing presence in the nation's industry and commercial climate, the laws that protect that technology have maintained pace.² However, the issues surrounding intellectual property have seen extensive litigation recently, with the Supreme Court hearing a number of cases on questions of patents alone.³ Litigation such as this often raises questions about how or why certain policies exist, and what is the most appropriate setup of institutions, policies, and procedures to achieve intended intellectual property goals. The ever-increasing complexity and interrelation between these protections and the economic health of the United States requires such an assessment.

Indeed, intellectual property laws make up a continuum of interwoven rights and protections that businesses, individuals, and other entities need to clearly possess to securely and confidently enter the marketplace.⁴ This continuum, however, is not only complex and ever-evolving, but also obtuse and at times ambiguous; it is not usually clear where a certain protection ends and another begins, or if more than one protection exists on the

same property.⁵ Regardless, intellectual property, in whatever form it takes, remains a fundamental component of the United States and world economies.

There should be concern, then, when the intellectual property policies, statements, and objectives of the United States are inconsistent or incongruous, a situation easily capable of arising. Some incongruence begins with the agencies responsible for the development and administration of United States patent, trademark, and copyright policy. These agencies are housed not just in two separate departments of the administration, but in two separate branches of government altogether. The United States Patent and Trademark Office ("USPTO"), an agency of the Department of Commerce, is the central authority for intellectual property protections focused on trademark registration and patent grants.⁶ The Copyright Office, however, which registers copyrights, drafts policy guidance, and testifies in intellectual property matters, is a section of the Library of Congress, which is funded and managed by legislative, not executive, branch staff.⁷ As such, the Copyright Office acts independently of the USPTO, the Department of Commerce, and the President. Nevertheless, various organizational models exist which could easily correct this nostalgic anomaly.

Part I of this paper sets out the historical setup and functions of the United States intellectual property offices, focusing on the disparate rise of patent and copyright laws. Part II discusses various proposals, such as S. 1961, the Omnibus Patent Act of 1996,⁸ on how best to align the intellectual property offices of the nation. Part III reviews

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1. See Dennis Crouch, *United States Intellectual Property Organization?: Curing a Fractured Administrative Structure*, PATENTLYO (Jan. 25, 2012), <http://www.patentlyo.com/patent/2012/01/united-states-intellectual-property-organization.html> (citing Congressional testimony of William Patry) ("It is really a quaint sort of nostalgia for the past. It is an obstacle for the future.").

2. See *Intellectual Property and Small and Medium-Sized Enterprises*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/about-ip/en/studies/publications/ip_smes.htm (last visited Apr. 28, 2012) (noting that the economy is increasingly "knowledge-driven" and describing the importance of innovation to the economic well-being of society).

3. See, e.g., *Kappos v. Hyatt*, 132 S. Ct. 1690 (2012); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012); *Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

4. Crouch, *supra* note 1 (explaining that businesses take a "layered approach" to intellectual property protections).

5. *Id.* (describing the difficulty overlapping property rights can have on consumers).

6. See *About Us*, UNITED STATES PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/about/index.jsp> (last modified Jan. 10, 2012).

7. See *A Brief Introduction and History*, UNITED STATES COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1a.html> (last visited Apr. 29, 2012); *About the Library*, UNITED STATES LIBRARY OF CONGRESS, <http://www.loc.gov/about/generalinfo.html> (last visited Apr. 29, 2012).

8. Omnibus Patent Act of 1996, S. 1961, 104th Cong. (1996).

the consequences of each, finding that the model proposed under S. 1961, creation of the United States Intellectual Property Office (“USIPO”),⁹ represents the most promising and logical organization of these offices. Part IV recommends and concludes that, for the sake of continuity in intellectual property, the Copyright Office should be incorporated into the USPTO to create the USIPO.

I. THE HISTORICAL BACKGROUND OF THE OFFICES OF INTELLECTUAL PROPERTY

The Founding Fathers recognized intellectual property protection as an essential tool for economic development, cultural and artistic endeavors, and the advancement of the sciences.¹⁰ Thus, they explicitly set out the foundation for copyright and patent law in the Constitution, writing that the federal government had the power to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹¹ While both the provision’s impact and its true meaning have been debated ever since the clause was drafted, these words have served as the underpinning of U.S. intellectual property law.

Despite the expansive nature of the constitutional language, intellectual property protection has, in nearly all instances, evolved to embrace very specific eligibility requirements and complex application/registration procedures.¹² Patent applications in particular involve an arduous and often drawn out examination process with significant procedural formalities.¹³ Similarly, the successful registration of trademarks and copyrights also hinge on adherence to specific rules, procedures, and time frames.¹⁴

Intellectual property protection is an important and dynamic foundation for our economic, scientific, and creative advancement. In fact, this area of law is so important that the Office of Management and Budget recently established the Office of the U.S. Intellectual Property Enforcement Coordinator to formulate and address many of the

pressing policy concerns involving intellectual property issues.¹⁵ The Intellectual Property Enforcement Coordinator (“the Coordinator”) is tasked with “develop[ing] a strategy to reduce [intellectual property violation] risks to the public, the costs to our economy and to help protect the ingenuity and creativity of Americans.”¹⁶ The Coordinator’s role is a step in the right direction, but, as discussed *infra*, more should be done to better align intellectual property policy objectives.

A. COPYRIGHT

At its core, copyright law protects “original works of authorship.”¹⁷ However, the determination of what constitutes such a work has required significant interpretation by courts and by the Copyright Office.¹⁸ Moreover, these interpretations have had to rapidly react to the technological revolution and new economic realities of the last twenty years, as software and other technologies have blurred the line between a work of authorship and a patentable invention.

Although the authority to establish copyright laws is found in the Constitution,¹⁹ copyright as a legal protection was not created until Congress passed the Copyright Act of 1790.²⁰ For many years subsequent, claims for copyright registrations were approved by clerks of federal district courts after the filing of a petition by a copyright owner.²¹

In 1800, the Framers decided to establish a national library to maintain written works in a public forum.²² Designated as the Library of Congress, it started out during the presidency of John Adams as a fledgling national library, purchasing approximately 740 volumes from Britain and slowly amassing other texts.²³ After the Library was destroyed by the British during the War of 1812, Jefferson

15. See *About the U.S. IPEC*, OFFICE OF THE U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, <http://www.whitehouse.gov/omb/intellectualproperty/ipec/> (last visited Apr. 29, 2012).

16. *Id.*

17. 17 U.S.C. § 102(a).

18. See, e.g., *Metro-Goldwyn-Mayer Studios Inc., v. Grokster, Ltd.*, 545 U.S. 913 (2005).

19. U.S. CONST. art. I, § 8, cl. 8.

20. See *A Brief Introduction and History*, UNITED STATES COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1a.html> (last visited Apr. 29, 2012).

21. *Id.*

22. *Jefferson’s Legacy: A Brief History of the Library of Congress*, LIBRARY OF CONGRESS, <http://www.loc.gov/loc/legacy/loc.html> (last visited Apr. 29, 2010).

23. *Id.*

9. *Id.* §§ 111(a)-113.

10. U.S. CONST. art. I, § 8, cl. 8.

11. *Id.*

12. See, e.g., 35 U.S.C. §§ 101-112 (2012) (setting out various statutory requirements and obstacles a patent application must overcome to issue).

13. *Id.*

14. See 15 U.S.C. §§ 1051-061 (setting out trademark procedures); 17 U.S.C. §§ 101-1332 (setting out copyright laws).

himself sold his own massive collection of books to restart the Library.²⁴ The goal of the Library of Congress was not only to serve as a national repository of written work or as a research service for Representatives and Senators, but to be the “world’s greatest multi-media encyclopedia.”²⁵ Throughout the 1800’s, the Library of Congress continued to grow. At one point, approximately fifty percent of the collection housed in the Library had been derived through implementation of the copyright laws,²⁶ which required copyright owners, both domestic and international, to submit their work to the Library through the Copyright Office.²⁷

In 1846, due to the increasing burden on the court system and the desire to use copyright deposits to expand the scope of the Library’s collection, Librarian of Congress Ainsworth Rand Spofford lobbied for the transfer of copyright registration duties to the Library of Congress.²⁸ Having previously been vested in the federal district court system, these responsibilities were transferred by Congress to the Library, and the Copyright Office was born.

For a brief period of time, from 1859 to 1870, all copyright activities were transferred to the Patent Office.²⁹ This change, along with the disarray caused by the Civil War, significantly affected the continued expansion of the Library of Congress, as it ceased receiving works from copyright registrants.³⁰ However, the Copyright Act of 1870,³¹ championed by Librarian Spofford, reestablished the copyright registration and deposit activities in the Library of Congress, and the Copyright Office was transferred back.³² Librarian Spofford is credited with revitalizing the Library of Congress and crafting much of the policy that continued to bolster the Library’s growth.³³

24. *Id.* (noting that President Jefferson made over \$23,000 through the sale of his collection).

25. *Id.*

26. *Id.* (calculating that forty percent of books and ninety percent of maps, music, graphic art and other media had been secured through deposits).

27. 17 U.S.C. § 407(a) (mandating that a copyright owner or licensee deposit two copies of a work to the Copyright Office within three months of publication or face penalties).

28. *Jefferson’s Legacy*, *supra* note 22.

29. *Id.*

30. *Id.*

31. 16 Stat. 198 (1870).

32. *Jefferson’s Legacy*, *supra* note 22.

33. *See id.* (“It was Spofford who had the interest, skill, and perseverance to capitalize on the Library of Congress’s claim to a national role. Each Librarian of Congress since Spofford has built upon his accomplishments.”).

The Copyright Office has continued under this structure into modernity. Into the 1990’s, it had amassed the world’s largest collection of works, including books, movies, and audio recordings,³⁴ as a result of subsidized registration fees and the legal requirement that any suit for copyright infringement must involve a registered work.³⁵ In other words, the Copyright Office mandated that authors give it their pieces if they wanted to exercise their legal right to these protections.³⁶ Moreover, Librarian Spofford and others formulated the policies of requiring two deposits of any copyrighted work with the Copyright Office, thereby ensuring that the Library of Congress has sufficient copies of all published documents.³⁷

With the rise of the Internet and the proliferation of increasingly robust software applications, the Copyright Office has been forced to address the complexities of digital language as a form of communication, and ultimately as an original work of authorship.³⁸ This has led to confusion about the specific roles of patent and copyright in the intellectual property continuum, as devices and technologies, and in particular, the software that makes them function, that may be eligible for patent protection may also constitute a copyright-protectable work.³⁹ This factor, while beneficial for owners of ambiguously protected works, is ultimately harmful to consumers and other users, whose use may be allowed under one protection scheme but restricted under another. It is questionable, however, whether this results in market overvaluation, since licensees may have

34. *Fascinating Facts*, Library of Congress, <http://www.loc.gov/about/facts.html> (last visited April 29, 2012) (noting that the Library has 151.8 million volumes on 838 miles of shelves).

35. 17 U.S.C. § 411 (2012).

36. *Copyright in General*, UNITED STATES COPYRIGHT OFFICE, <http://www.copyright.gov/help/faq/faq-general.html> (last visited April 29, 2012).

37. 17 U.S.C. § 407(a) (2012).

38. *See, e.g.,* Bartlett Cleland, *The Importance of Intellectual Property Rights*, The Heartland Institute (April 1, 2003), <http://heartland.org/policy-documents/importance-intellectual-property-rights?artId=11732> (suggesting that the “Information Age and the New Economy are forcing us to rethink property rights”).

39. *See Frequently Asked Questions*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/copyright/en/faq/faqs.htm> (last visited November 11, 2012) (“In the 1970’s and 1980’s, there were extensive discussions on whether the patent system, the copyright system, or a *sui generis* system, should provide protection for computer software.”); *see also How Should Software Be Protected?*, GALLAGHER & DAWSEY CO., LPA (Mar. 2002), http://www.invention-protection.com/ip/publications/docs/How_Should_Software_Be_Protected.html.

double protection in some instances, or market undervaluation, since end users may be hesitant to fully invest in a work where their right to its use is dubious. Regardless, the ambiguity involved in such protections skews their role and value, and policy choices and guidance affecting this situation must be consistently and carefully applied.

Today the Copyright Office states that its mission is to “promote creativity by administering and sustaining an effective national copyright system.”⁴⁰ It has made a concerted and obvious effort to refocus its public outreach on individual musicians, songwriters, authors, and filmmakers, despite the fact that many, if not most, suits sounding in copyright infringement involve major corporations, such as Google, Inc., Viacom International, Inc., Cambridge University Press, and the Motion Picture Association of America.⁴¹ In subscribing to this mission, the Copyright Office’s inclusion of, and spotlight on, individual content producers serves to further exclude major corporations, who have a substantial economic interest in well-crafted copyright protections, and substantially more to lose as a result of piracy and other infringement.

B. PATENT

Of the three forms of intellectual property protection, patent is the only one which yields an official grant of property rights.⁴² Copyrights and trademarks, conversely, may be established merely by creation or use of the copyrightable or trademarked property (although registration is encouraged or required in certain instances).⁴³ Patents may be granted for novel and useful technologies and inventions, and provide the patent holder with the right to exclude others from using, making, selling, or distributing the patented

property.⁴⁴ Because of the complexity of the patent laws, the unique, usually scientific, nature of patent-eligible materials, and the multitude of statutory requirements which Congress has established, there exists a separate patent bar solely for practitioners of this type of law.⁴⁵

The formative years of patent law in the United States were similar to copyright, but these forms of protection have taken widely divergent paths, with the Patent Office recognizing the primacy of patents in economic development and innovation.⁴⁶ Also arising from the same clause of the Constitution,⁴⁷ patent grants and protections were authorized by the Patent Act of 1790.⁴⁸ Just as federal district court clerks had issued copyright registrations, patent grants were originally issued not by the USPTO, but by the Secretary of State, the Secretary of War and the Attorney General, as members of the Patent Board.⁴⁹ This power was subsequently conferred exclusively to the Secretary of State in 1793, and was then delegated to the Superintendent of Patents in 1802.⁵⁰ For the next thirty-four years, the Superintendent of Patents and his staff dictated the grant of patents and the role of patent policy in the development of the country.

The Patent Act of 1836 established the Patent Office as a separate entity in the Department of State.⁵¹ In 1849, the Patent Office was transferred to the Department of the Interior, but, with the recognition of its important role

44. *Protecting Your Trademark*, *supra* note 43 (noting further that enforcement of the right to exclude was done without the assistance of the USPTO).

45. See Gene Quinn, *About the US Patent Bar Examination*, IP WATCHDOG (Jan. 3, 2008), <http://www.ipwatchdog.com/patent-bar-exam/> (“In order to represent clients before the United States Patent Office it is necessary to take and pass the Patent Bar Examination.”).

46. See *General Information Concerning Patents*, UNITED STATES PATENT AND TRADEMARK OFFICE, http://www.uspto.gov/patents/resources/general_info_concerning_patents.jsp (last visited November 11, 2012) (“[T]he [USPTO] promotes the industrial and technological progress of the nation and strengthens the economy.”).

47. U.S. CONST. art. I, § 8, cl. 8.

48. Patent Act of 1790, 1 Stat. 109, *available at* <http://docs.law.gwu.edu/facweb/claw/PatAct1790.htm>.

49. See *A Brief History of the Patent Law of the United States*, LADAS & PERRY, LLP, <http://www.ladas.com/Patents/USPatentHistory.html> (last visited April 29, 2012) (describing the brief stint of these cabinet members as the Patent Board).

50. *Records of the Patent and Trademark Office*, U.S. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, <http://www.archives.gov/research/guide-fed-records/groups/241.html> (last visited April 29, 2012).

51. *Id.*

40. *About Us*, UNITED STATES COPYRIGHT OFFICE, <http://www.copyright.gov/about.html> (last visited April 29, 2012).

41. See, e.g., *MDY Indus. v. Blizzard Entm’t*, 629 F. 3d 928 (9th Cir. 2010); *Ouellette v. Viacom Int’l Inc.*, 2011 WL 1882780 (D. Mont. 2011); *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).

42. See *General Information Concerning Patents*, UNITED STATES PATENT AND TRADEMARK OFFICE, http://www.uspto.gov/patents/resources/general_info_concerning_patents.jsp (last visited April 29, 2012) (distinguishing patent law from copyright and trademark laws).

43. *Id.*; *Protecting Your Trademark: Enhancing Your Rights Through Federal Registration*, UNITED STATES PATENT & TRADEMARK OFFICE, *available at* <http://www.uspto.gov/trademarks/basics/BasicFacts.pdf> (last visited April 29, 2012).

in the economic strength of the country, was subsequently transferred to the Department of Commerce in 1925.⁵² In 1881, the responsibilities of trademark registration were transferred to the Patent Office, which was subsequently renamed the United States Patent and Trademark Office in 1975.⁵³

Due to the boom of patent applications correlated with the technological revolution of the 1990's, as well as the increased body of prior art and the complexities of claim construction in applications, the time frame for securing a patent has grown substantially longer.⁵⁴ This has only been exacerbated by the decision in *State Street Bank and Trust Co. v. Signature Financial Group, Inc.*, which established the possibility of patent grants for covered business method patents, leading to a flood of patents from the financial services sector.⁵⁵ In 2007, for example, the USPTO had a backlog of well over one million patent applications.⁵⁶ While Congress has taken affirmative steps to reduce the delay, including the passage of the America Invents Act⁵⁷ and additional appropriations for employee funding, substantial work must still be done.⁵⁸

C. TRADEMARK

Trademarks and servicemarks – marks on services rather than goods – represent the third leg in the intellectual property continuum. Trademark ownership prevents others from using a word, logo, visual aid, or even a particular sound when the use of such mark causes a “likelihood

52. *Id.*

53. See *About the USPTO*, UNITED STATES PATENT AND TRADEMARK OFFICE, <http://www.usptocareers.gov/Pages/WhyWork/About.aspx> (last visited Nov. 13, 2012); see also *A Brief History of the Patent Law of the United States*, *supra* note 49.

54. See Anthony C. Tridico, *USPTO Backlog Impacts Biopharma Industry*, FINNEGAN (Sept. 1, 2008), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=6d5fd720-a740-403a-8912-54032b362b75> (noting that it was on average 25.3 and 31.9 months, respectively, before a patent applicant received a first Office Action from the USPTO and before a patent was issued).

55. *State St. Bank and Trust Co. v. Signature Fin. Grp., Inc.*, 149 F.3d 1368, 1376, 1377 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999). But see *Bilski v. Kappos*, 130 S.Ct. 3218, 3225 (2010).

56. See Tridico, *supra* note 54.

57. Leahy-Smith America Invents Act, Pub. L. No. 112-29 (to be codified in scattered sections of 35 U.S.C.).

58. See Dennis Crouch, *Addressing the USPTO Backlog*, PATENTLYO (Mar. 8, 2012), <http://www.patentlyo.com/patent/2012/03/backlog-down-and-up.html> (showing graphically the recent decrease in the patent backlog).

of confusion” for the general public.⁵⁹ While trademark rights may be established without registration, most businesses choose to register for several reasons, including *prima facie* validity of ownership should an infringement action ever arise.⁶⁰ The purpose of these marks to a consumer is two-fold: first, trademarks allow an end buyer to know the source of the goods or services they are purchasing; and second, trademarks allow an end buyer to avoid consumption of unintended goods.⁶¹ From the perspective of businesses, marks distinguish a particular set of goods or services in the marketplace, build and maintain brand relationships and goodwill, and keep value high and pricing consistent by excluding counterfeit goods.⁶²

Unlike patents and copyrights, the authority to grant trademark protections is not derived from Clause 8 of Article I, Section 8 of the Constitution. Instead, this protection was crafted under the powers of the Commerce Clause, which grants Congress the authority to “regulate commerce” among the states of the nation, Native American tribes, and foreign nations.⁶³ The Commerce Clause has been famously and extensively litigated, and represents one of the broadest, and therefore more tenuous, powers of Congress.⁶⁴ For a brief moment in intellectual property history, Congress attempted to use its copyright power under Clause 8 to regulate trademarks as well, but this was quickly struck down by the Trade-Mark Cases in 1879.⁶⁵ As a result, Congress passed the Trademark Act of 1881, which initially set out what would become modern trademark law.⁶⁶ The Act was amended in 1905 and again in 1920.⁶⁷

59. 15 U.S.C. §1114(1).

60. See *Protecting Your Trademark*, *supra* note 43 (establishing that registration allows a “legal presumption” of ownership in a mark).

61. See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163-64 (1995).

62. *Id.*

63. U.S. CONST. art. I, § 8, cl. 3.

64. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (further broadening the reach of the Commerce Clause to economic activity that standing alone does not have an effect on interstate commerce, but would, as a whole, have a substantial effect if every citizen were allowed to engage in the activity); *Wickard v. Fillburn*, 317 U.S. 111 (1942) (expanding the Commerce Clause’s reach to intrastate commerce with a substantial effect on interstate commerce).

65. *In re Trade-Mark Cases*, 100 U.S. 82 (1879).

66. See *U.S. Trademark History Timeline*, UNIV. OF TEXAS, <http://www.lib.utexas.edu/engin/trademark/timeline/tmindex.html> (last visited April 29, 2012).

67. *Id.*

In 1926, the Trademark Office was established in the Department of Commerce, one year after the Patent Office had made a similar transition.⁶⁸ The Lanham Act, which serves as the primary law governing trademarks today, was subsequently passed in 1946.⁶⁹ Cognizant that patent and trademark protections both function as important business protections and form the core of intellectual property protections sought, the Trademark Office was officially brought into the Patent Office in 1975.⁷⁰

II. PROPOSALS ON REORGANIZATION OF THE INTELLECTUAL PROPERTY OFFICES

While trademark and patent protections have long been associated with each other, copyright has not enjoyed this same association. Instead, the Copyright Office has attempted to brand itself as a purely cultural organization, largely eschewing the important role copyright protections play in the software and entertainment industries, among others.⁷¹ Indeed, nearly all industries produce a massive amount of information, including educational, legislative, and marketing information on blogs, newsletters, email alerts, and at conferences and meetings; all of this content may be covered by copyright protections.⁷² Nevertheless, the policies and perspectives of the Copyright Office may be inconsistent with, if not actually hampering, the goals of businesses and industry in the United States.

Regardless of whether actual problems in the Copyright Office have affected the U.S. economy, the fact remains that copyright protections are becoming a more controversial, divisive issue. The recently proposed Stop Online Piracy Act (“SOPA”)⁷³ and its sister legislation, the Protect Intellectual Property Act (“PIPA”),⁷⁴ and the fallout from these proposals⁷⁵

68. *Id.*

69. 15 U.S.C. § 1051 *et seq.* (1946).

70. *A Brief History of the Patent Law of the United States*, *supra* note 49.

71. See, e.g., David Christopher, *Congressman Goodlatte Addresses Staff at World IP Day Event*, UNITED STATES COPYRIGHT OFFICE (April 26, 2012), <http://www.copyright.gov/newsnet/2012/455.html> (specifically noting Register of Copyrights Maria Pallente “welcomed independent filmmakers and local songwriters and musicians at a gathering”).

72. Compare 17 U.S.C. § 102 with 37 C.F.R. § 202.1 (defining what is and what is not subject to copyright).

73. H.R. 3261, 112th Cong. (2011).

74. S. 968, 112th Cong. (2011).

75. See, e.g., Jenna Wortham, *Public Outcry Over Antipiracy*

demonstrate the widespread gap over the issue of copyrights between consumers and informational organizations on the one hand and major entertainment and publishing companies and other content generators on the other. The technological advancements of the twenty-first century have created a host of new challenges, which might only be successfully addressed by a committed and coordinated effort to better define and enforce intellectual property protections. In any case, these recent developments have raised the question of how the intellectual property agencies of the United States should be organized and whether they can be better aligned. There are several possibilities for restructuring, which have their own unique benefits and barriers. These include: continuing the current scheme, continuing the current scheme with additional powers granted to the Intellectual Property Enforcement Coordinator, or combining all three offices into the United States Intellectual Property Office.

A. CONTINUING THE CURRENT SCHEME

As it stands now, the Copyright Office is housed in the Library of Congress, where it is primarily controlled, managed, and funded by Congress. The Register of Copyright reports to the Librarian of Congress, who, while appointed by the President of the United States, serves as the chief librarian for Congress and develops and directs the policies of the Library and its offices.

Some argue that the Copyright Office should stay where it is. Individuals, particularly those at the Copyright Office, express concern that associating the Office with the USPTO or otherwise bringing it into the Department of Commerce will commercialize the objectives of copyright law, to the detriment of individual authors, musicians, and American culture as a whole.⁷⁶ Such a transition might also adversely impact the number of registrations received and the content available at the Library of Congress,

as demonstrated by the period of 1859 to 1870, when the Library ceased receiving copyright deposits.⁷⁷ Moreover, moving the Copyright Office will likely affect its appropriations from Congress, which funds about forty percent of the costs of the Office's operations.⁷⁸ While these may be reasonable points, they are limited in perspective to what is best for the Copyright Office and the Library of Congress, not what is best for the continuum of intellectual property or the governance of the American people.

The lack of coordination between the intellectual property offices and the inherent ambiguities in these various protections are increasingly creating problems as technology, art and authorship grow ever more entwined. Moreover, the Executive branch has no direct control over the policies of copyright law. While the President, with the consent of the Senate, appoints the Librarian of Congress, who in turn appoints the Register of Copyright, the position of Librarian of Congress sees very little turnover. In fact, there have been just thirteen Librarians in the history of the United States,⁷⁹ and the incumbent, James Hadley Billington, was sworn in on September 14, 1987, making his current term more than a quarter of a century.⁸⁰ As the incumbent Librarian was appointed during the Reagan Administration, six presidential terms have passed without the executive having a reasonable ability to select the policy makers of an important part of the federal government.

In addition to these problems, other administrative difficulties exist with the current setup. First, funding and accounting for activities of the Copyright Office can be an awkward situation politically, with the President tasked with approving a budget concerning an essentially executive agency controlled by the legislative branch. As discussed, the Copyright Office currently receives substantial appropriated funds, subsidizing the registration fee of copyright owners at the expense of taxpayers.⁸¹ In a

Bills Began as Grass-Roots Grumbling, NEW YORK TIMES, Jan. 19, 2012, available at http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html?pagewanted=1&ref=technology&_r=0 (discussing the tremendous public backlash through online service providers and popular websites caused by the impending vote on PIPA and SOPA).

76. See Statement of Marybeth Peters, Register of Copyrights, before the S. Comm. on the Judiciary, 104th Cong. (1996), available at <http://www.copyright.gov/docs/ipo.html>.

77. *Id.*

78. *Id.*

79. See *Previous Librarians of Congress*, LIBRARY OF CONG., <http://www.loc.gov/about/librarianoffice/librarians.html> (last visited April 29, 2012).

80. See *About the Librarian*, LIBRARY OF CONG., <http://www.loc.gov/about/librarianoffice/> (last visited April 29, 2012).

81. See Statement of Maria Pallante, Register of Copyrights, before H. Comm. on Appropriations, Subcomm. on the Legislative Branch, 112th Cong. (2012), available at <http://www.copyright.gov/>

political environment where the government is struggling to meet its financial obligations, the odd funding mechanism and the subsidy of copyright registrations could have negative budgetary consequences for the Office in certain situations.

Second, the Copyright Office is not obligated to get approval from the Office of Management and Budget ahead of any testimony before Congress.⁸² Therefore, it can and does present statements that might be at odds with the overall goals of the administration or other offices tasked with intellectual property protections, such as the Under Secretary of Commerce for Intellectual Property or the Intellectual Property Enforcement Coordinator. While some argue that this lends an independent voice to intellectual property policy making,⁸³ such a voice is misplaced in such a setting and is, at best, divisive. The executive branch is charged with carrying out the laws developed by Congress, making interpretative decisions where necessary. Therefore, anything that concerns the execution of the laws should be directed by the executive branch, and the current place of the Copyright Office prohibits this. Without some type of move, there will continue to exist an inability to effectively communicate a consistent message regarding United States intellectual property protections, both domestically and abroad.

B. ADDITIONAL POWERS GRANTED TO ENFORCEMENT COORDINATOR

While there are substantive problems with the Copyright Office remaining in the legislative branch, a possible intermediate solution involves keeping the offices in the same branches but ceding significant policy making and directive authority to the Office of the Intellectual Property Enforcement Coordinator (“Coordinator”).⁸⁴ The Coordinator was created in 2009, and its office is housed in the Office of Management and Budget.⁸⁵

docs/regstat020712.html.

82. *But cf.* The Mission and Structure of the Office of Management and Budget, Office of Management and Budget, http://www.whitehouse.gov/omb/organization_mission (last visited Oct. 13, 2012) (explaining that the Office of Management and Budget is responsible for “legislative clearance and coordination . . . to ensure consistency of agency legislative views and proposals with Presidential policy”).

83. *See* Statement of Marybeth Peters, *supra* note 76.

84. *See About the U.S. IPEC*, *supra* note 15.

85. *Id.*

Currently, much of the Coordinator’s role appears to involve enforcement abroad and foreign relations in intellectual property fora. Specifically, the Coordinator notes that “[i]nfringement also reduces our markets overseas and hurts our ability to export our products We want to be able to reduce the number of infringing goods in the United States and abroad.”⁸⁶ The Coordinator is invested in problem-solving in all three areas of intellectual property, but this is chiefly concerned with preventing counterfeit or infringing goods from affecting our economy or harming the health of American citizens.⁸⁷ In this vein, the Coordinator acts more within the frame of the United States International Trade Commission and the United States Customs and Border Protection Office.

While these are laudable objectives, they are more reactive than purely policy making. The Coordinator works to enforce the policies already established by other agencies, without crafting substantive new policies or procedures or modifying old ones.⁸⁸ As such, even as this office may be one solution to address intellectual property agency issues, it does not effectively address the root of the problem, namely that policies and positions may reflect varying values and priorities in the intellectual property continuum. As a result, it merely adds another voice into the cacophony of policy and enforcement guidance.

In order to sustain this as a possible solution, the Coordinator could be granted both policy making and enforcement power. Such a situation would entail having the Coordinator as the primary responsive voice for all questions of trademark, patent, or copyright, with all substantive testimony, guidance and rule making flowing through this office. While the USPTO and the Copyright Office would retain control of day-to-day matters, such as staffing, production, and budgets, significant issues such as rule making, advising the President, making recommendations to Congress on amendments to statutory language, and even filing of amicus curiae briefs regarding issues pertinent to intellectual property would be handled by the Coordinator. In addition, the Coordinator would serve as the point of contact

86. *Id.*

87. *Id.*

88. Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO-IP Act), H.R. 4279.

for all international conferences, discussions, treaty drafting, and other agreements. This would leave intact much of the cultural underpinnings the Copyright Office claims are so invaluable to its continued functioning, while ensuring that public statements and guidance would be clearly and consistently expressed.

While the solution could be successful with these changes to responsibilities, political pressures and tensions, particularly between the Office of Management and Budget and the Department of Commerce, would make such a change difficult.⁸⁹ Moreover, without additional structural changes, the Coordinator likely does not have the necessary resources to plan, implement, and enforce the nation's intellectual property protections. Even further, the Coordinator already commands an important role in effectively enforcing intellectual property policy, and those duties could be diluted with additional responsibilities.

C. CREATION OF THE USIPO

The most promising and sensible solution regarding realignment of the intellectual property agencies lies in a bill proposed nearly two decades ago, S. 1961.⁹⁰ Proposed by Senator Orrin Hatch of Utah and entitled the Omnibus Patent Act of 1996, this legislation set out the operations and structure of a potential United States Intellectual Property Office ("USIPO").⁹¹

The proposed law called for a government corporation,⁹² an organization, designed for commercial purposes, of which a government is the sole shareholder, which would be led by a Commissioner of Intellectual Property, a role that is essentially synonymous with the current Under Secretary of Commerce for Intellectual Property.⁹³

The Commissioner would be responsible for the high level management of the USIPO, and would "advise the President, through the Secretary of Commerce, of all activities of the office [related to foreign treaties and executive agreements]" and "be the principal advisor to the President . . . on policy matters relating to intellectual property rights, and shall recommend to the President . . . changes in law or policy which may improve [intellectual property right protections]."⁹⁴ Essentially, the Commissioner would serve as the single voice, the focal point, of United States intellectual property policy, and a clear, consistent, and resolute message could be broadcast not only to the President in an advisory capacity, but to the citizens of the United States and those of every other nation.

The structure of the USIPO would move the Copyright Office from the Library of Congress and establish it as a member of a "triumvirate" of intellectual property, along with the Patent Office and the Trademark Office.⁹⁵ Each Office would set its own fees to cover its costs, and no funds would be allocated or otherwise shared between offices.⁹⁶ The offices would, in essence, be self-contained, and no office would have primacy or managerial authority above the others.⁹⁷

The law also proposes that each office be led by a Commissioner.⁹⁸ Each Commissioner's job duties would be similar now to those of the Commissioners of Patent and Trademark and the Register of Copyright.⁹⁹ These Commissioners would be primarily responsible for the operations of their respective offices, and would also assist the Commissioner of Intellectual Property in policy formation and advising when addressing the subject matter of that specific office.¹⁰⁰ While this is relatively consistent with the current setup, it allows the administration, whether it be the Commissioner for Intellectual Property, the Secretary of Commerce, or the President himself, to appoint an individual as Commissioner of Copyright who shares the same ideals and perspectives as the rest of the administration. Administrations naturally tend to change

89. See Beryl A. Radin, *Does Performance Measurement Actually Improve Accountability?*, in ACCOUNTABLE GOVERNANCE: PROBLEMS AND PROMISES 105 (Melvin J. Dubnick & H. George Frederickson eds., 2011) (highlighting that because of OMB's niche role in the Federal budget process, the Office often has a tense relationship with individual departments).

90. Omnibus Patent Act of 1996, S. 1961, 104th Cong. (1996).

91. *Id.*

92. See Government Accountability Office, *Profiles of Existing Government Corporations*, 100th Cong. 2nd Session (1988), available at http://gallyprotest.org/profiles_of_existing_government_corporations_gao_report_1988.pdf (discussing the history and purposes traditionally served by government corporations).

93. S. 1961, 104th Cong. §113(b) (1996).

94. *Id.*

95. *Id.* §113(a).

96. *Id.* §113(b)(2)(E).

97. *Id.*

98. *Id.*

99. S. 1961, 104th Cong. §113(c).

100. *Id.*

leadership positions as a new president is elected, and this would allow a new administration to control the individuals responsible for crafting and executing the laws. This setup allows for such choice in the Commissioner of Copyright.

This intellectual property administrative model—a central administrator with three subordinate administrators in specific subject areas—is common internationally. Indeed, a number of countries, such as the United Kingdom, Singapore, the Philippines, and Canada, have established a national intellectual property office to address all of the intellectual property needs of their citizenry.¹⁰¹ Moreover, the model is used by the World Intellectual Property Organization (WIPO), which, like the World Health Organization or the World Trade Organization, is a specialized agency of the United Nations.¹⁰² WIPO administers and coordinates much of the international activity affecting intellectual property, and assists developing countries in drafting and passing effective intellectual property laws.¹⁰³ While it arguably performs a different function from that of an intellectual property organization in a single country, WIPO's establishment and longevity are good signs for the efficiency of such a model.¹⁰⁴

III. BENEFITS AND DETRIMENTS OF INTELLECTUAL PROPERTY REALIGNMENT PROPOSALS

Each proposal discussed above presents both positive and negative elements. While specific outcomes are merely estimations, there is good theoretical information supporting the implementation of the USIPO as the most appropriate and most logical standard available.

A. CONTINUING THE CURRENT SCHEME

The Copyright Office in its current setup represents the least desirable organizational form,

101. See *Directory of Intellectual Property Offices*, WIPO, <http://www.wipo.int/directory/en/urls.jsp> (last visited Oct. 11, 2012) (listing each country's intellectual property office setup).

102. See *What is WIPO?*, WIPO, <http://www.wipo.int/about-wipo/en/> (last visited Apr. 29, 2012).

103. *Id.*

104. *Id.*; see generally WIPO Program and Budget for the 2012/13 Biennium 8-12, Sept. 29, 2011, available at http://www.wipo.int/export/sites/www/about-wipo/en/budget/pdf/budget_2012_2013.pdf (noting the financial and performance achievements and goals of WIPO).

though there are benefits to this setup. These include subsidization of copyright costs, which would otherwise discourage smaller organizations and individuals from possible registration of legitimate copyrights. Currently, copyright registration fees range from \$35 to \$220 per work depending on the type of work and the manner in which it is registered.¹⁰⁵ Compared to patent application and prosecution costs, which vary widely but are always in the thousands of dollars for application and legal fees,¹⁰⁶ the cost to register a copyright is minimal. From the standpoint of the individual author or filmmaker, this is probably good public policy, but when considering that a movie studio, major record label or university publishing house pays similar fees, the policy that the public must subsidize a portion of those fees becomes questionable at best. The Copyright Office has, however, recently submitted a Notice of proposed rulemaking in the Federal Register which explores the possibility of raising costs.¹⁰⁷ Nevertheless, the Office requested approximately \$3.1 million in appropriations funding from Congress for fiscal year 2012.¹⁰⁸

In addition, the Copyright Office is currently a relatively stable platform, and there is legitimacy to the argument that it should remain in place until such a setup ultimately becomes tenuous or unwieldy. Furthermore, the Copyright Office's systems have been developed specifically for its use with the Library of Congress, and it would likely cost several million dollars to transfer the Copyright Office into the USPTO or another organization.¹⁰⁹

Despite these positives, the Copyright Office remains an entirely executive agency couched in the legislative branch purportedly as a simple cultural icon. As the Register of Copyright herself states, however, the Copyright Office has

105. See *Fees*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/fees.html> (last visited Apr. 29, 2012).

106. See, e.g., *Patent Cost Information*, INVENTIONSTATISTICS.COM, http://www.inventionstatistics.com/Patent_Cost.html (last visited Apr. 29, 2012) (setting out a wide array of total fees and costs for patent prosecution).

107. Copyright Office Fees, 77 Fed. Reg. 18742 (Mar. 28, 2012).

108. See Statement of Maria Pallante, *supra* note 81.

109. Statement by Allen Li, Associate Director, Resources, Community, and Economic Development Division, Gov't Account. Off. before Sen. Comm. on the Judiciary, 5-6, Sept. 18, 1996, available at <http://www.gao.gov/assets/90/81027.pdf> (discussing the minimum costs estimated to transfer the Copyright Office's staff and functions from the Library of Congress).

provided testimony to Congress and assisted in cases with the Department of Justice on matters of copyright protections.¹¹⁰ In other words, this Office is actively participating in the execution of the law and the formation of regulatory policy. Recent controversies about copyright protection indicate that these laws are extremely important to the public, highly politicized, and can have a far-reaching effect for American business sectors, both nationally and internationally.¹¹¹ Because of the popular concern, their development and execution should be vested in an individual or organization which the public has a reasonable degree of influence over. As it stands now, the public has no control over the decisions and objectives of the Copyright Office.

B. ADDITIONAL POWERS GRANTED TO ENFORCEMENT COORDINATOR

As discussed above, there does exist the possibility of making the Intellectual Property Enforcement Coordinator the acting head of U.S. intellectual property.¹¹² However, this solution does not sufficiently resolve the identified problems, as the Under Secretary of Commerce for Intellectual Property would ostensibly still have a role in administration and policy formation. Instead, the office of the Coordinator is better suited for the role it currently plays: focusing exclusively on enforcement actions, attempting to curb piracy and counterfeit importation, and carrying the policy objectives the intellectual property offices have developed and implemented.¹¹³

C. CREATION OF THE USIPO

On balance, the USIPO has all of the strengths necessary for continuing to exercise sound intellectual property administration, while shedding or working around any negative aspects which might remain. These benefits include enhanced communication as a result of a single, vetted, and consistent intellectual property message, increased consistency and decreased ambiguity in the application of

intellectual property protections and a better definition of boundaries, more thorough and accurate advisement by the USIPO to the President and other executive branch staff, and reduced administrative costs. Not only do these benefits outweigh any negatives, any potential consequences have simple, quick-fix solutions.

1. A Unified Message

First, creation of the USIPO from the mixed ashes of the USPTO and the Copyright Office would be useful in establishing a clear and concise message on the United States' intellectual property positions. Importantly, all testimony and written statements before Congress that an agency such as the USPTO or USIPO might offer must be given to and approved by the Office of Management and Budget before the statements are made.¹¹⁴ This procedure alone would positively affect the consistency of statements and guidance by which these policies are interpreted and executed. Moreover, the Commissioner of Intellectual Property, the proposed head of the USIPO, would possess the ability to advise the President and executive branch members on each area of intellectual property law without a dissenting voice refocusing or disrupting the policy choices made.¹¹⁵ This ability would also extend to the public in general, and allow for a greater demarcation of rights.

2. Consistent IP Boundaries

This demarcation of rights may, as technology continues to develop, prove to be the most important benefit provided by the USIPO model. As discussed, the complexities and interactions between copyright law and patent law, and to a lesser extent trademark law, are growing exponentially each day. As individuals are better enabled to expand available technologies and develop innovative new ideas and solutions, they will continue to employ any and all protections available to them so that they might successfully license their work to an intermediate or end

110. See Statement of Maria Pallante, *supra* note 81.

111. See, e.g., Wortham, *supra* note 75.

112. *About US IPEC*, *supra* note 15.

113. *Id.*

114. See *The Mission and Structure of the Office of Management and Budget*, OFFICE OF MANAGEMENT AND BUDGET, http://www.whitehouse.gov/omb/organization_mission (last visited Oct. 13, 2012) (describing OMB's legislative clearance and coordination responsibilities, one of its "critical processes").

115. Omnibus Patent Act of 1996, S. 1961, 104th Cong. § 113(b)(2)(B) (1996).

user. However, the ambiguities that arise in these interactions between copyright and patent protections, and who owns what, can hurt the value of the work produced when a work is both patentable and copyrightable.

Moreover, competitors could, in certain situations, create cross-blocking ownership rights, whereby one rival owns a patent and the other a copyright to substantially the same technology. Particularly after the change from a “first-to-invent” to a “first-to-file” system under the America Invents Act,¹¹⁶ someone who produces a technology first and therefore probably has a more intrinsic and obvious right to a copyright, may not file a patent application first. This cross-blocking could create considerable difficulties in the use or subsequent development of technological and software inventions.

The USIPO model, however, could address these difficulties; with a single organization determining the metes and bounds of copyright or patent protection, market actors would have sufficient prior knowledge of the extent of the ownership interest in a given work. In fact, the USIPO may establish an Intellectual Property Resolution Board (“IPRB”), which would serve in a similar manner to the Trademark Trial and Appeal Board or the Board of Patent Appeals and Interferences.¹¹⁷ The IPRB would be responsible for resolving any conflicting grants of property rights, specifically delineating the rights of the parties to use, sell, or market the work at issue. As well, the Commissioner or the organization could issue policy guidance on how to delineate the limits where each protection ends before parties ended up before the IPRB. This would likely have significant implications for future policy choices.

3. Consistent Policy Guidance

In addition to this important aspect of the USIPO, such an organization would be better suited to advising senior decision makers on this

116. Leahy-Smith American Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (to be codified in scattered sections of 35 U.S.C.).

117. See, e.g., *Board of Patent Appeals and Interferences*, UNITED STATES PATENT AND TRADEMARK OFFICE, http://www.uspto.gov/about/offices/ogc/bpai_about.jsp (last modified Sept. 8, 2011); *Trademark Trial and Appeal Board*, UNITED STATES PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov/about/offices/ogc/ttab.jsp> (last modified Sept. 20, 2012).

area of the law. Specifically, the Commissioner of Intellectual Property, along with the three subordinate commissioners for each office, would work together to enlighten and advise the executive branch on the totality of any issues affecting intellectual property. As it stands now, any advisement is fraught with tunnel-vision.¹¹⁸ The advice usually represents the best outcome for the entity giving it, instead of the best outcome for the policies of the United States and its people.¹¹⁹ While members of the Copyright Office claim the USIPO debate unduly politicizes the Office,¹²⁰ it is, in fact, just the opposite. Recent legislation and the renewed interest in copyright protections have indeed politicized the Copyright Office, because both sides of the copyright debate are concerned about the current state of enforcement in the country and abroad.¹²¹ Moving into the USIPO, conversely, would shield the Copyright Office from this negative public exposure and politicization, as the President, Secretary of Commerce, and Commissioner of Intellectual Property would be pulled into the political arena before the Commissioner of Copyright. In addition, there is a subtle tension now between the commercially-driven USPTO and the culture-preserving Copyright Office.¹²² The move would bring resolution to this tension as well.

4. Realizing Significant Cost Savings

Finally, administrative cost savings may be realized by the creation of the USIPO. At the outset, the USIPO was designated as a government corporation.¹²³ This means the entity does not receive any appropriated funding except in rare and emergency circumstances and operates solely

on the collection of fees for service.¹²⁴ The USPTO already acts in this manner, and in fact, actually returns a percentage of its fees to the coffers of the general treasury each year.¹²⁵ *In totum*, patent and trademark owners pay the full operational costs of the USPTO as part of the respective application and registration processes. Under S. 1961, none of the three offices may commingle or share funds.¹²⁶ This is an important point, as the Copyright Office currently does not cover the cost of its operations on fees alone.¹²⁷ As a part of the USIPO, the Copyright Office's fee structure would need to change. Of course, the fees involved are negligible compared to trademark and patent fees. By forcing the Copyright Office to pay its own way, the cost to taxpayers through appropriations will be removed.

Furthermore, the USIPO can realize administrative efficiencies in its operations and possibly in the actual registration process as well. Specifically, the Copyright Office would no longer need the entirety of the support staff it has, as the USPTO staff would likely be able to run many of the day-to-day operations of all three offices efficiently. In addition, as the USPTO and the Copyright Office both are considering or developing new tracking software for the digital age, the offices could develop a single system for use, instead of duplicating efforts and creating unnecessary redundancy in intellectual property processes. At the very least, the Trademark Office and Copyright Office could share a similar electronic system, as searching and cataloging under these areas of law is narrower and simpler than patent law.¹²⁸

This raises the further possibility that employees processing trademark registrations

118. Statement of Marybeth Peters, *supra* note 76, at 4.

119. *Id.*

120. *Id.*

121. See, e.g., *SOPA debate: Who's involved and what are the stakes?*, WASHINGTONPOST.COM, http://www.washingtonpost.com/business/economy/sopa-DEBATE-whos-involved-and-what-are-the-stakes/2012/01/17/gIQAZAVq5P_gallery.html (last visited Oct. 14, 2012) (assessing the parties involved and their respective actions regarding copyright protection and infringement).

122. See, e.g., *A Brief Introduction and History*, UNITED STATES COPYRIGHT OFFICE, <http://www.copyright.gov/circs/circ1a.html> (last visited Oct. 14, 2012) ("[t]he archives maintained by the Copyright Office are an important record of America's cultural and historical heritage.").

123. See Government Accountability Office, *supra* note 92, at 2.

124. See *id.*

125. See *User Fees Withheld from the U.S. Patent and Trademark Office (USPTO)*, INTELLECTUAL PROPERTY OWNERS ASSOCIATION, http://www.ipo.org/AM/Template.cfm?Section=Legislative_Priorities&Template=/CM/ContentDisplay.cfm&ContentID=29295 (last visited Oct. 12, 2012) (noting that \$85 million dollars in user fees was diverted from USPTO to support other government functions).

126. Omnibus Patent Act of 1996, S. 1961, 104th Cong. § 113(b)(2)(E) (1996).

127. Statement of Maria Pallante, *supra* note 81, at 1.

128. Patent grants require a specialized technical understanding, passage through an intricate set of statutory limitations, and an exhaustive search of potentially thousands of documents covering prior art. Conversely, copyright and trademark searches generally only require that the materials covered by the application have not been registered before or, in the case of trademarks, are not likely to confuse the public.

could also be used to process copyright registrations. While the standards of each type of protection are different, the basic premise is the same for each, and doesn't require the same technical knowledge that patent examiners must maintain. Trademark and copyright staff could be reassigned and retrained on an "as needed" basis should demand change for each type of registration. Moreover, given both the importance and permanence of a copyright or trademark registration, attorneys with an understanding of intellectual property law are necessary to process applications. Here, the flexibility of an already skilled workforce could result in substantial savings for training, hiring, and experiential development.

5. Other Concerns

Despite the possibilities for success that the USIPO model engenders, there are concerns about the effects of a transition by the Copyright Office. In particular, the former Register of Copyrights, Marybeth Peters, delivered an impressive overview of these concerns to Congress during hearings on S. 1961 in 1996.¹²⁹ In her testimony, she laid out four specific criticisms of the proposal, including the increased economic burden on copyright owners, a decline in the use of copyright registration, loss to Congress and the public of a "balanced, non-partisan voice in the formation of copyright policy," and the commercialization of copyrights to the detriment of its cultural and artistic underpinnings.¹³⁰ While these concerns are legitimate, they can be dispelled even with the formation of the USIPO.

Understandably, small businesses, independent artists, directors, and writers, and other individuals who rely on copyright protection cannot afford to pay massive fees to cover the costs associated with the operation of the Copyright Office. The basic fee currently is \$35, which for a single song or short story may be high, but is very reasonable for any sort of commercial work.¹³¹ In its budget request to Congress, the Copyright Office explained that its fee collection activities only covered approximately sixty percent of its costs; it therefore requested an additional

\$3.1 million.¹³² Based on these numbers, it collected fees of approximately \$4.65 million in 2011, and had a total cost of approximately \$7.75 million for the year. Assuming for simplification purposes that the only fees collected were the \$35 filing fees, the Copyright Office would need to increase its rate to \$58.33 per registration to completely meet its operational costs for the year. While no doubt a higher number, \$58.33 seems reasonable for the protections being offered. While this is admittedly a gross simplification, it does elucidate the fact that the numbers involved are insignificant compared to the costs of patent prosecution.

Even assuming that individuals would be hurt by an increase in prices, the Copyright Office could institute a tiered fee schedule, so that, in essence, corporate copyright owners would subsidize the copyright applications of individual composers, authors, and artists. In fact, the subsidized costs to individuals could possibly go beneath \$35 depending on the reasonableness of the costs to larger entities and the specific interplay of the budget. Even now, although Ms. Peters used the economic burdens of copyright owners as a defense to transfer in 1996, the Copyright Office itself has proposed rulemaking that would increase the costs of registration substantially.¹³³ As such, the USIPO's self-funding mandate would not adversely impact the continued operations of the Copyright Office. There is precedence for a tiered fee structure system at the USPTO, where, under the America Invents Act, the USPTO offers pricing breaks for small businesses and universities.¹³⁴

Ms. Peters further indicated that an increase in pricing and other factors would result in the overall decrease of copyright registrations received.¹³⁵ This, in turn, would further affect the funding issues just discussed. Not only would this be bad from a policy perspective, she argued, since fewer individuals might avail themselves of the copyright protections available, but this would also affect the collections of the Library of Congress and disclosures to the general public.¹³⁶ However,

129. Statement of Marybeth Peters, *supra* note 76.

130. *Id.* at 1.

131. See Copyright Office Fees, 77 Fed. Reg. 18,742 (Mar. 28, 2012).

132. Statement of Maria Pallante, *supra* note 81, at 1.

133. Copyright Office Fees, 77 Fed. Reg. 18,742, 18,743-44 (Mar. 28, 2012).

134. Changes to Implement Micro Entity Status for Paying Patent Fees, 77 Fed. Reg. 31,806, 31, 807-13 (May 30, 2012) (to be codified at 37 C.F.R. pt. 1).

135. See Statement of Marybeth Peters, *supra* note 76, at 1.

136. See *id.* at 3.

this argument completely ignores the mandates of the Copyright Act of 1870, which requires that a publisher of any copyrightable work deposit two copies of the work with the Copyright Office within ninety days of publication.¹³⁷ Notably, this provision is in effect regardless of whether the copyright owner also seeks registration at the same time.¹³⁸ Even if the Copyright Office became a part of the USIPO, it would still receive a virtually endless supply of books, films, software, audio recordings, and other media from entities seeking to protect their work or initiate litigation for infringement. In this vein, neither the Copyright Office, nor the Library of Congress, nor the American public would be deprived of the disclosure of important works of authorship.

As discussed above, the role of entities performing executive functions is to be extensions of the President. The housing of the Copyright Office in the Library of Congress does not change the fact that it is an executive, not a legislative, body, and as such, should be inwardly operating at the direction of the President and outwardly expressing the sentiments of the President. Ms. Peters testified that the Copyright Office provided Congress a “balanced, non-partisan voice” regarding copyright policy issues.¹³⁹ Unfortunately, this is not the role that the Copyright Office should play. In such a capacity, the Copyright Office acts like the Government Accountability Office or other so-called “fourth branch of government” entities,¹⁴⁰ when it should be fostering and promoting the goals of the current executive administration.

Finally, Ms. Peters was concerned about the commercialization of the Copyright Office if it became a part of the USIPO, which would focus on the economics of these intellectual property protections.¹⁴¹ The concern here is that the Copyright Office has served an important role as the depository of cultural information, Americana and foreign works alike, and would no longer be able to do so as part of the USIPO. Nevertheless, this argument fails to mention that intellectual

property rights, like any property rights, are secured and enforced because they usually have some financial value. If the work of cultural or artistic expression had no economic value that was worth protecting, a creator would probably not bother to register the work in the first place.¹⁴² Moreover, many works are copyrighted by entities whose sole purpose is commercial. Businesses, software developers, movie producers and record labels might seek to protect the work they have paid to have produced, and this is intended to exclude others from using the work so that they can derive monopoly profits from it. While there is undoubtedly a cultural and artistic component to the Copyright Office’s function, it belies the economic realities of this protection to allege that its *main* purpose is cultural.

IV. RECOMMENDATION AND CONCLUSION – THE RISE OF THE USIPO

Even if there is not a cognizable problem currently, the digital revolution and the rapidly changing economic conditions in the United States suggest that future copyright policy must be addressed sooner than later. A powerfully compelling model for addressing this situation, the USIPO, not only exists, but has been proposed in the past.¹⁴³ Other proposals exist as well, but none offer a fundamental rethinking of intellectual property objectives like the USIPO model.

In any case, the USIPO model should be reconsidered by members of Congress. In the wake of SOPA and PIPA, there is sufficient political thought devoted to these issues to sustain the passage of such a bill. While the Copyright Office may not agree with the transfer and the intrinsic benefits of such a setup, Congress would be remiss in delaying further action on this topic. The current presence of the Copyright Office in the Library of Congress is a vestige of the past, which does not adequately serve the present or future administrative goals of the country.¹⁴⁴

137. 17 U.S.C. § 407(a) (1997).

138. *Id.* (allowing the deposit requirement to be used as part of the registration process).

139. See Statement of Marybeth Peters, *supra* note 76, at 1.

140. See, e.g., KEVIN B. SMITH & MICHAEL J. LICARI, PUBLIC ADMINISTRATION POWER AND POLITICS IN THE FOURTH BRANCH OF GOVERNMENT 114 (Dawn VanDerCreek & Sacha A. Howells eds., 2006).

141. See Statement of Marybeth Peters, *supra* note 76, at 5.

142. See Copyright Law Revision, 86th Cong., 2d Sess. 72-73 (1960), available at <http://www.copyright.gov/history/studies/study8.pdf>.

143. Omnibus Patent Act of 1996, S. 961, 104th Cong. (1996).

144. See Crouch, *supra* note 1.